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# Newsroom

## New York Times Cites Dean Logan

Dean David Logan talks to the New York Times about the legal hurdles facing claimants seeking less concrete Gulf oil-spill damages against BP.

**The New York Times** quotes **Dean David Logan** in an article titled, "[Should BP's Money Go Where the Oil Didn't?](#)" by David Segal.

**ST. PETE BEACH, Fla., October 23, 2010:** In late April, a week after the BP oil spill began, Keith Overton had an alarming encounter with one of his employees here at the TradeWinds Resort. The guy — an engineer who had worked at the hotel for a dozen years — had just spoken with his mother, who lives in Bosnia, and the conversation went like this:

"Are you going to be fired?" she asked.

"Fired?" the son replied. "Why would I get fired?"

"Because your beach is covered with oil," she said.

Actually, there wasn't a drop of oil anywhere in sight. Not then, not in the months that followed and not now. This barrier-island city and snowbird haven is hundreds of miles from the nearest land befouled by the collapse of the Deepwater Horizon platform and the epic gusher it left behind.



"That was the moment I realized how big the problem had become," recalls Mr. Overton, who runs the resort. "At first we thought, 'Well, people will know there's a spill in the Gulf of Mexico, and they won't think that St. Pete has been affected.' "

Not so. After the explosion on April 20, there were some cancellations, but what really wrecked the summer for TradeWinds was the countless number of people who feared that oil was about to hit St. Pete and never called in the first place. By Mr. Overton's calculations, his profits from April to late October sank by slightly more than \$1 million, compared with his average earnings during the same period for the last three years.

Of course, anyone who bothered to look at a map would have known that St. Pete Beach — and hundreds of other vacation spots throughout the Sunshine State — would have pristine beachfronts through the summer, even under the worst of the worst-case scenarios.

But Mr. Overton and others don't blame tourists or the news media for failing to grasp basic geography and ocean currents. They blame BP, and they think the company should compensate them for money they would have earned but for the onset of black-crude hysteria.

Are they right? Should companies like TradeWinds collect damages from an oil spill even if their beaches were never sullied? Put another way, should BP have to pay for economic hardship caused by the public's reaction to the oil, even if that reaction was utterly irrational?

The answers involve a sum of money that can safely be described as staggering. The aftermath and legal wranglings of the BP fiasco have focused so far on commercial interests — like fishing, shrimping and food processing — that relied directly on the gulf for their livelihoods. For the most part, these are people in Louisiana, Mississippi and Alabama.

What has scarcely been noted, however, is that virtually oil-free Florida just might Hoover up the bulk of BP's settlement money. The company has set aside \$20 billion for a fund intended to make whole both private enterprises (for lost earnings) and the states and the federal government (for cleanup costs), with a promise to throw additional money in the pot if more is needed to cover legitimate claims.

But what if every business in Florida's \$60 billion-a-year tourist trade stands up and demands compensation for what it would have earned this summer had the spill not happened?

And what if hotels, restaurants, gas stations, miniature-golf courses, amusement parks, grocery stores, retailers, movie theaters and others want more than just those losses? What if they demand future lost revenue, too — money that would have come to Florida next year, and the year after, but won't because people who spent their summer vacations in, say, South Carolina decided that they liked it enough to go back?

None of this should be very hard to imagine — because it's happening. According to the estimates of plaintiffs' lawyers, more than 100,000 entities in Florida will make what are known as proximity claims, which are based on arguments of indirect harm.

Already, the sheer number of Florida claims is outpacing those of Louisiana, among claimants who have provided addresses of where they suffered damages to the Gulf Coast Claims Facility, which is administering the BP fund: 35,500 versus just over 31,000, as of last week. Even businesses in Miami and Key West are lawyering up.

"The entire tourism industry in this state has been impacted by people's fear that oil was going to hit Florida, whether those fears were reasonable or not," says Brian Barr, a Florida lawyer and a member of the plaintiffs' executive committee in the BP case. "People don't come to Florida to sit in a hotel. They come to enjoy the natural resources of this state, and they were worried that the oil would affect that resource."

Proximity claims, it turns out, fall into an area that has been debated for decades in law schools and in court opinions. Until early October, Kenneth Feinberg, the longtime mediator and the lawyer in charge of administering the spill fund, said publicly that he wouldn't consider such claims, in part because he thought they would open a door that thousands of businesses across the country would try to walk through.

The theoretical possibilities are endless. A restaurant owner in Boston: "I had a Gulf shrimp scampi special that was off the menu for months. Pay me." A T-shirt maker in Tennessee: "I'm stuck with 10,000 'I Love Pensacola' shirts. Pay me." These examples are just conjecture, but real ones are piling up. Thousands of claims from all 50 states have already been filed.

There is another reason that Mr. Feinberg initially balked at proximity claims: it's far from clear how they'd fare if they ever landed in court.

But he was "clobbered," as he later put it, by Floridians, including some high-profile critics like the state attorney general. In a little-noticed reversal, Mr. Feinberg announced on Oct. 4 that he and his team would consider, though not necessarily pay out, proximity claims.

Now, plaintiffs' lawyers in Florida are already worrying aloud that BP hasn't set aside the kind of money that would constitute real compensation.

“They’re worried that \$60 billion won’t be enough, and they might be right,” Mr. Feinberg said in a recent interview. “Especially if every single restaurant and hotel in Florida can simply stand up and say: ‘Before the spill. After the spill. Pay me the difference.’ ”

Mr. Feinberg then shrugs like a man trying to wrap his arms around a number that is simply too large to fathom.

A DECISION about proximity claims is coming in the next few weeks, with the approach of the Nov. 23 application deadline for emergency payouts related to the spill. For now, all eyes are on Mr. Feinberg as he determines the rules and decides who will be dealt a hand in a game of Texas Hold 'Em with some of the highest stakes in legal history.

His job is to keep everyone at the table. For him, success means presenting terms to all sides that sound more appealing than ditching the claims process and opting for an expensive, protracted swarm of lawsuits.

As Mr. Feinberg would be the first to acknowledge, this won’t be easy. Florida plaintiffs might assume that juries will be sympathetic if these cases actually get to court. Then again, if plaintiffs overreach, BP might decide that it has no choice but to try its luck in the judicial system, betting that judges might toss out cases before they get to trial, or that big verdicts could be scaled back or even tossed out on appeal.

The trick for Mr. Feinberg is to sort through a jumble of legal minutiae, state politics and pitched emotion to find a solution that feels Solomonic to everyone, or at least better than the alternatives.

“The decision to at least consider proximity claims is the correct one,” he says, enunciating carefully in his Massachusetts accent and speaking, as he always does, loud enough for the hard of hearing.

“Everybody stays in the fund and, hopefully, decides not to sue. But the big issue remains — how do I assess the damages?”

For a guy on the verge of such a weighty decision, Mr. Feinberg seems at ease. Sitting one recent morning in his spacious office at his Washington law firm, Feinberg Rozen, he sips San Pellegrino Limonata as an opera plays faintly from a stereo system near his desk. His interior decoration of choice appears to be adulatory newspaper articles about Ken Feinberg. One is a recent [Boston Globe](#) editorial headlined “[Can Ken Feinberg Be Cloned?](#)” This would seem a little egomaniacal if the guy didn’t project so much decency and personal warmth.

The Globe article, and many others, praise Mr. Feinberg for earlier performances distributing money in catastrophes. He was acclaimed for processing the 9/11 victims fund established by the federal government. He resolved 97 percent of those cases on his own. A mere 94 went to court.

It's a success rate that he does not anticipate in the BP matter. Part of the problem is no one is sure how BP will handle the Florida cases. The company didn't respond to interview requests.

The other issue confronting Mr. Feinberg is one of sheer volume.

"If proximity isn't a bar to claims, who knows how many there will be," he says.

Big numbers present complications. Almost from the start, there have been accusations leveled at Mr. Feinberg and his 25 assistants that claims for those hit hardest and most directly in the gulf aren't being processed fast enough; in late September, the Justice Department described the pace of his work as "unacceptable." Adding tens of thousands of claims from Florida, and the rest of the country, won't help.

Then there is the matter of resource allocation. To the extent that there is a limit to what BP will pay, this is a zero-sum game, and in Louisiana, there is growing anxiety that proximity claims will siphon money from those suffering the most.

"There is a huge concern here about depletion of the BP fund," says Patrick Juneau, who is working as a liaison to Mr. Feinberg on behalf of the attorney general of Louisiana. "Obviously, we're at ground zero here in Louisiana, and the farther away someone is from the oil, the more questions are raised by the claim — like whether the losses were really the result of the spill."

ON a late September afternoon, the temperature at the TradeWinds is just warm enough for sunbathing and the sky is cloudless, but the white-sand beach abutting the hotel is nearly empty.

"We run at about 30 percent occupancy in September," says Mr. Overton, a square-jawed 43-year-old in a Hawaiian shirt who manages to look both stern and laid back at the same time — picture Jimmy Buffett's bodyguard. "We make all our money in six months, and our best months are March to July."

He is giving a tour of the premises — 800 hotel rooms and condo rentals and 13 bars and restaurants — and explaining why the spill could hardly have been timed worse. He has a spreadsheet detailing his losses and the story behind those figures.

The tale is more complicated than just "People stopped booking rooms here." What happened is that occupancy rates sank, which led Mr. Overton to drop prices. That pushed up occupancy rates, which left

him with what he calls “the double whammy” — a large-ish number of visitors, with all the overhead costs they incur, but a smaller revenue stream to cover those expenses.

Details like this get to the challenge of proximity claims: figuring out what, if anything, they’re worth.

How much of the TradeWinds’ duress can be blamed on its strategy, which led to the dire-sounding “double whammy”? Is BP liable for both whammies? If another hotel experienced a triple whammy, should BP pay for all three? And how much of the TradeWinds’ troubles this summer stemmed from the lousy economy, as opposed to oil-phobia?

Once the resort asks for money for future losses, which it plans to do, there are more imponderables. Mr. Overton couldn’t maintain the level of staffing that he desired, and, as a result, service suffered.

“You arrive at the hotel and it takes you an extra couple minutes to get your stuff unloaded,” he says. “It takes longer at the front desk, and you get up to your room and you think: ‘I’m not going to come back to this place. It just isn’t up to my standards.’ How do you value that?”

How indeed? And once you figure that out, how do you decide what part, if any, of the shortfall should be covered by BP?

It’s the kind of conundrum that scholars have been puzzling over for a very long time.

ON the morning of Aug. 24, 1924, a 43-year-old homemaker named Helen Palsgraf stood on the Jamaica Station platform of the Long Island Rail Road in Queens, waiting for a train. When it arrived, a man struggling to climb aboard was given an assisting push by a railroad employee on the platform and a pull by another employee on the train. That caused the man to drop the package he was carrying, a newspaper wrapped around some fireworks.

What happened in the next few seconds was described the next day in The New York Times as a “short-lived pyrotechnics display,” though it sounds more like a scene from a Looney Tunes reel. The fireworks exploded, and the shock reportedly toppled a scale on the platform some distance away, which fell on Ms. Palsgraf.

She sued the railroad over her injuries and won \$6,000, roughly \$75,000 in today’s dollars. But her victory didn’t last. It was reversed by the New York Court of Appeals, and the majority opinion in the 4-to-3 decision was written by the future Supreme Court justice Benjamin N. Cardozo.

To win a tort claim, as every law student knows, a plaintiff needs to prove that a defendant was negligent and owed the plaintiff a duty — in Ms. Palsgraf's case, a duty not to be harmed. Chief Judge Cardozo was skeptical that railroad employees had acted negligently, because the package carried by the passenger didn't outwardly appear to be dangerous. But, more important, he dismissed Ms. Palsgraf's claim because she was "outside the zone of foreseeable danger" and therefore was not owed a duty.

The key finding was this: The further away a plaintiff is from the defendant — physically, or as part of a causal chain — the harder it is to win a lawsuit.

This opinion, in [\*Palsgraf v. Long Island Railroad Co.\*](#), became a central touchstone of American tort law, one with such abiding force in legal culture that a re-enactment of the 1924 accident, performed with Legos, is now [posted on YouTube](#).

As narrow as the law is when it comes to indirect physical harm, it is narrower when the harm is indirect and economic.



"The classic law school case example is a guy who negligently rams his boat into a bridge and the bridge collapses," says **David Logan, dean of the Roger Williams University School of Law in Bristol, R.I.** "Business on that island is shut down for as long as it takes to rebuild the bridge. But generally, the law says that unless the boat physically harmed your property, you can't collect."



At root, the law is concerned that people would be reluctant to operate a boat, or drill for oil, if liability for an accident extended to its innumerable ripple effects. In the case of the Exxon Valdez, a tanker that devastated the Alaskan shore with oil in 1989, none of the plaintiffs making proximity claims — hunting lodges, fishing lodges, cruise ships and so on — were given a dime.

“We were operating under federal maritime law,” says David Oesting, an Anchorage lawyer who handled litigation for the plaintiffs, “which basically says ‘no touch, no foul.’ It was and is terrible.”

Mr. Oesting speaks of the Valdez litigation in the present tense because it isn’t over. On the day of this phone interview, an assistant in a nearby office was preparing the last round of checks — about \$130 million — to be sent to plaintiffs, 21 years after the accident.

ALL of this history explains why, in legal circles, Mr. Feinberg’s original decision to bar proximity claims was considered utterly mainstream. But the BP oil spill was unlike any that came before it — larger, and beamed live on television for months. And the legal patchwork of laws under which plaintiffs can make claims now includes the [Oil Pollution Act](#), which provides for “damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction or loss of real property, personal property or natural resources.”

Does that include a hotel on a beach, 450 miles from the nearest oil? How about one 50 miles inland from the same beach?

Working outside of the court system, Mr. Feinberg isn’t necessarily constrained by the act, or state or federal tort law. But to figure out what, if anything, these claimants should be paid, he needs a sense of what would become of them if they slogged through the dockets.

So Mr. Feinberg has quietly hired one of the country’s foremost scholars on torts — he declined to provide a name — to write a memorandum about the validity and value of proximity claims.

The memo is due soon, and Mr. Feinberg has no idea what it will say. But it won’t serve as a blueprint, he says. It will serve as leverage. If the memo states, for instance, that certain proximity claims are stinkers, Mr. Feinberg could say to claimants, “You’ll get nothing in court, but I’ll give you 20 cents or 30 cents on the dollar.”

Or the memo could say that some claims might well succeed, but only after clearing a very high standard of proof of damages. Then Mr. Feinberg could offer a slightly lower standard.

Those are just two of many possibilities. Regardless of what is in the memo, Mr. Feinberg won't start writing checks willy-nilly, no matter how many plaintiffs line up, no matter how many people yell at him, and no matter how many people are eager to see BP punished, legal niceties be damned.

This guy is versatile, but Santa Claus is one role he will not play.

Mr. Overton and other business people in Florida think this is no time for stinginess. He likens the BP oil spill to hurricanes that struck the state years ago, and he worries that the impact will be the same.

"We haven't had a hurricane since '04, but still today, we can't get close to achieving the occupancy level we had in August and September, pre-'04," he says. "People know a hurricane is possible and they don't want risk it."

The analogy between storms that actually destroyed property and a spill that did not is hardly perfect. But this may be the only difference that matters: you can't sue Mother Nature.

*For full story, click [here](http://www.nytimes.com/2010/10/24/business/24claim.html?_r=0). [http://www.nytimes.com/2010/10/24/business/24claim.html?\_r=0]*